

APPEAL NO. 010733

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 9, 2000, with the record closing on March 11, 2001. The hearing officer resolved the disputed issues of maximum medical improvement (MMI) and impairment rating (IR) by determining that the appellant (claimant) reached MMI on March 30, 2000, with a 9% IR. The claimant appealed the IR determination and the respondent (carrier) responded.

DECISION

Reversed and rendered with regard to the IR issue.

Section 408.125(e) provides that if the designated doctor is chosen by the Texas Workers' Compensation Commission (Commission), the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that, if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Section 408.124(b) provides that for determining the existence and degree of an employee's impairment, the Commission shall use "Guides to the Evaluation of Permanent Impairment," third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

The claimant testified that on _____, she injured her left upper extremity, neck, and lower back when boxes of merchandise fell on her at work. CT scans of the claimant's cervical spine and lumbar spine done in September 1999 showed a protrusion at C4-5, C3-4, and L5-S1. Dr. V, a chiropractor, has treated the claimant for her injury.

Dr. D examined the claimant at the carrier's request on December 9, 1999, and he reported that the claimant reached MMI on December 9, 1999, with a 2% IR. Dr. D assigned impairment of 1% for abnormal lumbar lateral range of motion (ROM) and 1% for abnormal left shoulder ROM. Dr. D wrote that the claimant's cervical ROM testing was invalid due to poor effort and that lumbar flexion/extension ROM did not meet validity criteria.

Dr. W reported that EMG studies done on December 14, 1999, were suggestive of bilateral C6 radiculopathy and bilateral L4 radiculopathy.

The Commission chose Dr. B, a chiropractor, as the designated doctor to determine MMI and IR. Dr. B examined the claimant on March 30, 2000, and certified that the claimant reached MMI on March 30, 2000, with a 30% IR. Dr. B assigned impairment for a specific disorder of the cervical spine, a specific disorder of the lumbar spine, abnormal cervical ROM, abnormal lumbar ROM, and abnormal left upper extremity ROM.

Dr. V wrote that the 30% IR assigned by Dr. B is correct. Dr. J, a chiropractor to whom Dr. B referred the claimant, noted her agreement with the MMI date and 30% IR certified by Dr. B.

Dr. G reviewed medical records at the carrier's request, but did not examine the claimant, and reported that the records support a 9% IR; however, he noted that the ROM measurements in Dr. B's report met consistency requirements and that the straight leg raise (SLR) measurements did not invalidate the lumbar flexion and extension measurements.

Dr. D reviewed Dr. B's report at the carrier's request in May 2000 and Dr. D reported that the impairment assigned by Dr. B for abnormal ROM should be invalidated based on poor effort on the part of the claimant.

Dr. D reexamined the claimant in August 2000 at the carrier's request and he reported that the claimant reached MMI on March 30, 2000, as had been certified by Dr. B, the designated doctor, and that the claimant has a 9% IR. Dr. D assigned impairment for a specific disorder of the cervical spine and a specific disorder of the lumbar spine. Dr. D reported that the claimant was self-limiting on ROM testing and that there was extremely poor reliability on claimant's ROM testing and thus he invalidated ROM impairment.

Dr. D testified that the impairment Dr. B assigned for abnormal lumbar flexion and extension ROM is invalid because, in Dr. D's opinion, the measurements recorded in Dr. B's report did not meet the SLR validity criteria. Dr. D also testified that the claimant did not appear to give full effort on cervical ROM testing and that the amount of impairment Dr. B assigned for cervical and lumbar ROM was unusual in light of the claimant's injury.

The claimant appeals the following findings and conclusion of the hearing officer:

FINDINGS OF FACT

2. The findings of the designated doctor are contrary to the great weight of the credible medical evidence in that the designated doctor's findings are contrary to the protocols of the AMA Guides.
3. [Dr. D] issued a valid certification that claimant reached [MMI] on March 30, 2000, with a 9% [IR].
4. The great weight of credible medical evidence is that claimant reached [MMI] on March 30, 2000 with a 9% [IR] in accordance with the findings of [Dr. D].

CONCLUSIONS OF LAW

2. Claimant reached [MMI] on March 30, 2000, with a 9% [IR].

With regard to MMI, the claimant requests that we find that the claimant's MMI date is the date determined by Dr. B, the designated doctor. The benefit review conference report reflects that the parties agreed that the claimant reached MMI on March 30, 2000, as determined by Dr. B. Since the hearing officer found that the claimant reached MMI on March 30, 2000, which is the MMI date determined by Drs. B and D, there is nothing for us to review on the issue of MMI. The claimant's date of MMI is March 30, 2000.

With regard to the IR issue, Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991. In Texas Workers' Compensation Commission Appeal No. 941482, decided December 13, 1994, we noted that when a hearing officer does not base his determination of an IR on the report of the designated doctor, the hearing officer should detail the evidence, state why the great weight of other medical evidence is to the contrary, and state in what regard the other evidence greatly outweighs the report of the designated doctor.

In the instant case, the hearing officer set out in the Statement of the Evidence what the carrier "asserts" and "argues" but did not state what assertions or arguments the hearing officer found to be persuasive and supported by the evidence, nor did the hearing officer make any findings of fact with regard to how the designated doctor's findings are "contrary to the protocols of the AMA Guides." In addition, the hearing officer's Statement of the Evidence and findings of fact do not mention the overwhelming evidence that supports the designated doctor's IR; that is, the treating doctor, Dr. V, reported that Dr. B's 30% IR is correct; Dr. J, the referral doctor, reported that she agreed with Dr. B's 30% IR; and Dr. G, the carrier's peer review doctor, wrote that the ROM measurements in Dr. B's report met consistency requirements and that the SLR measurements did not invalidate lumbar flexion and extension measurements.

As noted, Section 408.125(e) provides that the report of the designated doctor chosen by the Commission shall have presumptive weight and that the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. We have held that the "great weight" determination amounts to more than a mere balancing or preponderance of the evidence and that a designated doctor's report should not be rejected "absent a substantial basis." Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. In the present case, without an explanation or finding from the hearing officer as to what "protocols" of the AMA Guides the designated doctor did not follow and with the great weight of the medical evidence supporting the designated doctor's 30% IR, we conclude that the hearing officer's findings that the designated doctor's findings are contrary to the AMA Guides and that the claimant has a 9% IR are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We reverse the hearing officer's decision that the claimant's IR is 9%

and we render a new decision that the claimant's IR is 30% as determined by the designated doctor.

At the CCH, the carrier asserted, and provided testimony from Dr. D (which was contradicted by other medical reports), that the measurements recorded in Dr. B's report did not meet the SLR validity criteria of the AMA Guides, and the carrier asserts the same thing in its response. In a recent Commission Question/Resolution Log (QRL) 01-13 with an answer date of February 6, 2001, the question posed was "What is the process for selecting sacral ROM measurements for lumbar flexion and extension angles and validating them under the SLR." The resolution is set forth in paragraphs (a) through (e), with (e) stating as follows:

Once consistency is attained for SLR and flexion and extension, identify the maximum true flexion angle and maximum true extension angle. Then add the sacral ROM angle that corresponds to the maximum flexion angle to the sacral ROM angle that corresponds to the maximum extension angle and compare those values to the maximum SLR measurement on the tightest side. If the SLR exceeds total sacral (hip) motion by more than 10 degrees, the test is invalid and should be repeated. Consult Abnormal Motion section of Table 56 to determine impairment of the whole person.

Applying the method stated in the QRL to the measurements recorded in Dr. B's report, the SLR test was not invalid as the SLR did not exceed total sacral (hip) motion by more than 10 degrees.

The hearing officer's decision that the claimant has a 9% IR is reversed and a new decision is rendered that the claimant's IR is 30%.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge